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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

JOE E. FRYAR
Petitioner

VERSUS

EDWARD C. ABELL, JR., and
CAREY WALTON, ET AL
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER JOE E. FRYAR TO RESPONDENTS' BRIEF IN OPPOSITION TO HIS PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF J. MINOS SIMON
Attorneys at Law
1408 West Pinhook Road
Post Office Box 52116
Lafayette, Louisiana 70505
(318) 233-4625

By: J. MINOS SIMON
ATTORNEY FOR PETITIONER
JOE E. FRYAR

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MAY IT PLEASE THE COURT:

Petitioner **JOE E. FRYAR** submits this reply brief to address the arguments first raised in the opposition brief to his petition for writ of certiorari, filed by respondents **EDWARD C. ABELL, JR.**, and **CAREY WALTON**, et al. Respondents' opposition brief instances an argumentative, licentious and factually insupportable statement designed to detract from the fundamental legal question of national concern presented by petitioner **Fryar's** petition for writ of certiorari and to create a bias against petitioner **Fryar** as a means of depriving him if his right to have the legal question presented thoughtfully and impartially considered by this Court. There is no factual basis for respondents' statement in their opposition brief as to (1) the acts of fraud

mentioned and (2) to the time span of alleged fraudulent activity. Furthermore, petitioner **Fryar's** conviction for jury tampering **IS NOT FINAL**. In an effort to present this Court with a balanced view of the facts proved at trial, petitioner will address respondents' assertions on a point-by-point basis.

(A). POINT-BY-POINT REBUTTAL

First, contrary to respondents' assertion, it was not petitioner **Fryar** who initiated the Westside project (the project) in 1976. Rather, the uncontradicted evidence established that the project's initiator was one Charles Fine. Mr. Fine subsequently approached petitioner **Fryar** with his idea for a facility to care for mentally retarded and emotionally disturbed citizens of

Louisiana because he had no experience in the construction and funding of the physical plant for such a facility. It was only then that petitioner Fryar became involved in the project.

Second, contrary to respondents' assertion, it was not petitioner Fryar who turned to the possibility of **financing the project through tax-exempt bonds** and who enlisted the assistance of Joseph D. Hancock and his underwriting firm, Hancock, Joseph & Daniel. Rather, the uncontradicted evidence established that Mr. Fine, while a member of the Alexandria Public Housing Authority, first met Mr. Hancock. After hearing of the project, it was Mr. Hancock who proposed to Mr. Fine the financing of the project through tax-exempt bonds. And, it was Mr. Fine who sought out Mr. Fryar's assistance in making the proposal a reality.

Third, contrary to respondents' assertion, the consulting firm of Booz, Allen & Hamilton, Inc., never made a finding that the project, **as proposed by Mr. Fine**, was not financially feasible. Rather, the uncontradicted evidence showed that Booz Allen made a fundamental error in its assessment of the project. That is, it assessed a project directed toward the care of mentally retarded patients, while the project as proposed was directed to the care of mentally retarded **and emotionally disturbed** patients. The controversy arising out of this error was that Booz Allen had received payment from petitioner **Fryar**, as developer, for services not performed or recklessly performed.

Fourth, contrary to respondents' assertion, the Louisiana State Bond Commission did not decline to approve financing for the project. Rather, the

uncontradicted evidence showed that it was petitioner **Fryar** who **refused** to accept the conditions to be imposed upon him under the financing plan involving the Louisiana State Bond Commission. Under this plan, petitioner **Fryar** would have to construct the facility and operate it at his cost until the occupancy level necessary for government reimbursement was achieved. Petitioner **Fryar's** cost for doing this was projected to reach $6,268,537.00, while his anticipated profit was only $916,950.00. Petitioner **Fryar** rejected this proposal because he believed that the potential profit did not justify his assumption of the enormous risks of the project.

Fifth, contrary to respondents' assertion, petitioner **Fryar** did not organize All American Services, Inc., nor was it "his Bermuda corporation".

Rather, the uncontradicted evidence showed that All American Services, Inc., was a Bermuda corporation owned by a Bermuda financier, i.e., one Clayton Chambers, who died before this matter went to trial. There was no credible evidence presented to show that petitioner **Fryar** had anything to do with the establishment of this corporation.

Sixth, contrary to respondents' assertion, the property transactions between petitioner **Fryar** and All American Services, Inc., and later, between All American Services, Inc., and Westside were not designed to conceal anything. Rather, the property transactions were all recorded in the public records in Alexandria, Louisiana, where the project was located, and, as such, they were available to public scrutiny.

Seventh, contrary to respondents' assertion and the quote taken from the district court's ruling of March 26, 1987, the handwritten letter from the president of All American Services, Inc., to petitioner **Fryar** did not just happen to mysteriously appear during the course of the trial. Rather, that letter was produced quite some time before the trial began in connection with the deposition of All American Services, Inc., which was taken in Bermuda.

Eighth, contrary to respondents' assertion, petitioner **Fryar** and All American Services, Inc., had not received approximately $900,000.00 in interest payments on the $2,000,000.00 worth of Westside bonds owned by that corporation. Rather, the uncontradicted evidence showed that petitioner **Fryar** had

experienced a net loss of $474,300.00 by the time the project was completed.

Ninth, contrary to respondents' assertion, All American Services, Inc., never threatened Mr. Ian Fleming with adverse action, if he testified at the trial on the merits of this matter. The alleged threat described by respondents in their brief was part of a telefax message. (See respondents' opposition brief at pp. A-27 and A-28). The appearance and origin of this so-called telefax "threat" may euphemistically be characterized as nothing less than melodramatic. To elaborate.

While respondents claim that the district court held a two (2) day evidentiary hearing on this message, the truth is that the trial was adjourned so that respondents could once again take the deposition of All American Services,

Inc., and petitioner **Fryar** could take the deposition of respondents' counsel, **Kyle Schonekas**, relative to the origin of the telefax message.

In his deposition, **Mr. Schonekas** initially testified that he found the telefax message late one evening during the trial, while reviewing volume (2) two of **Max Quin's deposition** in his hotel room. **Mr. Schonekas** testified that he was alone at the time because he considered the telefax message to be such a "significant" find that he would have immediately shown it to another of respondents' counsel, if they had been in the room with him. However, **Mr. Schonekas** refrained from calling anyone to report his "significant" find. Moreover, although he rode with respondents' other counsel some twenty (20) miles the next morning from Lafayette, Louisiana, where they were staying to

Opelousas, Louisiana, where the trial was held, **Mr. Schonekas** stated that he "**simply forgot**" about his "significant" find until **later that day** during the trial.

But, as undersigned counsel pressed on in his examination, **Mr. Schonekas** abruptly **changed** the testimony he had previously given under oath regarding the time and place, when he made his "significant" find. Now, **Mr. Schonekas** claimed that he made his "significant" find during the day **while the trial was being conducted** and that he immediately passed the telefax message to respondents' other counsel. **Mr. Schonekas** then made the unsolicited statement that, if he had found the telefax message late in the evening as he had previously testified, then "I would have been -- I would have called Ms. Barrasso or somebody else about it". **Mr. Schonekas**

also changed his previous testimony given under oath about being engaged in the task of **designating portions** of Mr. Quin's deposition, when he made his "significant" find. Instead, **Mr. Schonekas** now testified that he was **looking through the exhibits** attached to Mr. Quin's deposition for a document he knew to be there, when he "found" the telefax message.

During his second version of making this "significant" find, **Mr. Schonekas** testified under oath that he found the telefax message the day before it was brought to the district court's attention. In response to undersigned counsel's questions, **Mr. Schonekas** stated that he definitely found the telefax message before noon. However, when asked when he presented this "significant" find to the senior member of respondents' legal team, **Mr. Phillip A.**

Wittmann, Mr. Schonekas replied that "[i]t would have been that afternoon or that evening, **something like that**". A short while later, **Mr. Schonekas again changed** his testimony given under oath to state that it could also have been during the lunch break, when he told **Mr. Wittmann** about his "significant" find. Petitioner **Fryar** submits that the most "significant" thing about **Mr. Schonekas'** equivocal testimony is that it was taken **only a few days** after he made his "significant" find. Yet, **Mr. Schonekas** was unable to consistently recall dates, times, places or people associated with his "significant" find.

The deposition of **Mr. Schonekas** was taken at the New Orleans office of his law firm. During that deposition, petitioner **Fryar**, observing the peculiar telefax print characteristic of the word "total" on the alleged telefax

message, called his Alexandria office and requested his secretary to telefax a letter document to him through the telefax machine used by **Mr. Schonekas'** law firm in New Orleans. When petitioner **Fryar's** telefaxed document was received, he compared it with the respondents' "telefax message". This comparison established that the peculiar print characteristic of the word "total" was identical on both documents, overwhelmingly indicating the use of **Mr. Schonekas'** law firm's telefax machine as to both documents. There is reproduced on the left below the telefax print of the word "total" on respondents' alleged "telefax message" and on the right below the telefax print of the word "total" on petitioner **Fryar's** telefaxed document received through the telefax machine used by **Mr. Schonekas'** law firm, to wit:

Thus, it is made to appear that the document alleged to contain a "threat" was actually received by respondents' counsel over their own telefax machine. If this is so, then it contradicts **Mr. Schonekas'** testimony given under oath that he found the telefax message containing the threat in Mr. Quin's deposition. Contrary to respondents' assertion, the district court refused to admit the telefax message into evidence after being confronted with this information. Moreover, during **Mr. Schonekas'** deposition, undersigned counsel developed information that respondents' chief counsel, **Mr. Phillip A. Wittmann**, had, some two years previous, professional dealings with Mr. Max Quin, a Bermuda lawyer, whose deposition spawned the mysterious "threat" message. Adding to

the mystery of this documents is that no other party or his counsel in attendance at Max Quin's deposition, when documents were produced, ever saw the telefax message and it never formed part of the certified copies of Max Quin's deposition supplied by the court reporter. Strangely, respondents proclaim that this document manifested itself in their counsels' deposition record, only.

Tenth, contrary to respondents' assertion, there was no evidence presented at trial to establish that petitioner **Fryar** was involved in any scheme other than the single, limited fraudulent scheme alleged in respondents' complaint. There was absolutely no evidence presented to implicate petitioner **Fryar** in any transaction for which, as **Mr. Hancock** testified, his firm had been suspended for five (5) days and fined $4,000.00 by the National

Association of Securities Dealers. Respondents' attempt to support the existence of a separate fraudulent scheme with such nonexistent evidence illustrates the absolute meritless nature of their entire case. There was also no evidence presented to support respondents' assertion that petitioner Fryar had submitted fraudulent cost reports to the State of Louisiana Medicaid Program. Rather, the United States Court of Appeals for the Fifth Circuit captured the essence of respondents' proof of only a single, limited fraudulent scheme, when it held:

> "Here, plaintiffs have alleged over half a dozen acts of mail fraud and wire fraud, **each of which stems from Westside's bond offer.**" (Emphasis added).

(B). ISSUE RAISED BELOW

Though burdened and handicapped during trial of this case by the breath-taking sweep of **R.A.G.S. Couture, Inc. v. Hyatt**, 774 F.2d 1350 (5th Cir. 1985), petitioner **Fryar**, after trial and in his motion for judgment n.o.v. raised in the district court the issue presented in his petition for certiorari:

> "The plaintiffs' claims, based on an alleged violation of the racketeer influenced and corrupt organizations act ("RICO"), must fail because the plaintiffs have failed to prove all of the elements of a cause of action based on this statute".

In his supporting brief, petitioner **Fryar** contended that respondents had failed to prove that his "participation" in the alleged enterprise, "was through a 'pattern of racketeering activity' which the statute defines as the commission of at least two predicate acts as designated in 18 USC Section 1960(1)."

In his original brief on appeal, petitioner **Fryar** contended, inter alia,

> "Interrogatory Verdict No. 17 makes an award of $850,000.00 to plaintiffs under plaintiffs' RICO claim. It is respectfully submitted that as a matter of law such a verdict is insupportable essentially because (a) there was no evidence upon which a reasonable juror could rely to conclude that there existed a **pattern of racketeering activity** consisting of at least two predicate acts or (b) that plaintiffs sustained injury or damage to their business or property." (Emphasis added).

The foregoing pithy statement followed section (6) of his original brief on appeal containing the heading:

> "As a matter of law plaintiffs are entitled to recover nothing under their RICO claim.
>
> (a) Plaintiffs proved **no pattern of racketeering activity**."

That the legal question presented in petitioner **Fryar's** petition for writ of certiorari was presented and adversely decided by the Fifth Circuit

is conclusively established by the following excerpt from that court's decision:

> "**Fryar also contends that RICO requires plaintiffs to prove at least two related predicate acts arising from distinct schemes.** See 18 U.S.C. Section 1962 (requiring a RICO plaintiff to prove a 'pattern of racketeering'). **Fryar's brief correctly notes that '[p]laintiffs have fashioned their RICO claim from the matrix of their securities law fraud claims.'** From this observation, Fryar concludes that the plaintiffs failed to prove the predicate acts necessary to establish a 'pattern of racketeering.'
>
> Our cases, however belie Fryar's legal analysis. In **R.A.G.S. Couture, Inc. v. Hyatt**, 774 F.2d 1350 (5th Cir. 1985), we held that RICO requires only that the predicate acts alleged be related, not that they arise from separate schemes or incidents. **Here, plaintiffs have alleged over half a dozen acts of mail fraud and wire fraud, each of which stems from Westside's bond offer. R.A.G.S.** requires no more. But see **Montesano v. Seafirst Commercial Corp.**, 818 F.2d 423, 426 (5th Cir. 1987); **Crocker v. F.D.I.C.**, 826 F.2d 347, 348 n. 2 (5th Cir. 1987), cert. denied, ____ U.S. ____, 108 S.Ct. 1075, 99 L.Ed. 2d 235 (1988); **Smith v. Ayers**, 845 F.2d 1360, 1365-66 n. 18 (5th Cir. 1988). (Each of these cases criticizes **R.A.G.S.**, but notes that only

the court sitting en banc or the Supreme Court may overturn **R.A.G.S.**)"

In his petition for rehearing, petitioner **Fryar** again urged the question presented in his petition for certiorari in these words:

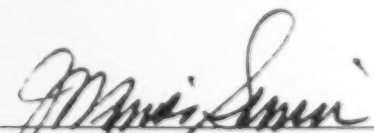
"This Court has overlooked or misapprehended the law in holding that **R.A.G.S. Couture, Inc. v. Hyatt**, 774 F.2d 1350 (5th Cir. 1985) was applicable to this case because that decision was rendered in an appeal from a summary judgment whereas this appeal is from a final judgment on the merits. Moreover, **R.A.G.S. Couture, Inc.**, supra, conflicts with the decision of the Supreme Court in **Sedima, S.P.R.L. V. Imrex Company, Inc.**, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

Contrary to the assertions made by counsel for respondents, petitioner **Fryar** has never waived his right to assert the question presented in his petition for certiorari by having failed to raise that question in the courts below.

FOR THE FOREGOING REASONS, and those contained in the petition for writ of certiorari filed by petitioner JOE E. FRYAR, this Court should reverse that portion of the judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed the district court's judgment holding petitioner liable to respondents under the civil RICO statutes.

Respectfully submitted:

LAW OFFICES OF J. MINOS SIMON
Attorneys at Law
1408 West Pinhook Road
Post Office Box 52116
Lafayette, Louisiana 70505
(318) 233-4625

By: 
J. MINOS SIMON
Fed. Id. No. 3810

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of this Reply Brief of Petitioner Joe E. Fryar to Respondents' Brief in Opposition to His Petition for Writ of Certiorari have this date been supplied to all counsel of record by United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 10th day of May, 1989.

J. Minos Simon

J. MINOS SIMON